

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

ALEXANDRIA CLINIC, P.A.

Employer

and

SHAWN STONE

Petitioner

and

AFSCME COUNCIL 65, as successor to
MINNESOTA LICENSED PRACTICAL
NURSES ASSOCIATION

Union

Case 18-RD-2469

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to decertify the Union, which was certified to represent certain employees of the Employer on March 19, 1998 in Case 18-RC-16226. The Union opposes processing this petition, contending that the eligibility status of a number of individuals is uncertain. Therefore, according to the Union, no election should be held, or further processing of this petition should be delayed. In the alternative, the Union contends that should an election be ordered, those eligible to vote would be employees who went on strike in September, 1998 and not their replacements. However, I reject the Union's contentions, and will order an election as specified below.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹

3. The labor organization involved claims to represent certain employees of the Employer.²

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. There are no facts in dispute. Rather, the issue is how to proceed in view of the facts.

I certified the Minnesota Licensed Practical Nurses Association to represent a unit of licensed practical nurses including registered nurses and medical assistants working as licensed practical nurses, on March 19, 1998. In September, 1998, the Employer terminated all unit employees who chose to strike in support of the Union's contractual demands. By a Decision and Order dated August 21, 2003, the Board concluded that the Employer's termination of those employees who struck was not unlawful because the Union violated Section 8(g) of the Act. See Alexandria Clinic, P.A., 339 NLRB No. 162. The Union is appealing the Board's decision to the Eighth Circuit Court of Appeals.

The Union contends that because it is appealing the Board's decision to the Eighth Circuit Court of Appeals, that this petition should be dismissed or the election delayed, or those eligible to vote should be limited to the striking employees and not their replacements. The Union cites numerous Board cases which stand for the proposition that strikers who have been

¹ The Employer, Alexandria Clinic, P.A., is a Minnesota corporation with an office and place of business in Alexandria, Minnesota, where it is engaged in the operation of a medical clinic providing ambulatory medical services. During the past 12 months, a representative period, the Employer purchased and received goods and services valued in excess of \$50,000 directly from suppliers located outside the State of Minnesota and the Employer derived gross revenues in excess of \$1,000,000.

wrongfully terminated, or who have not been permanently replaced and have not otherwise abandoned their jobs, remain eligible to vote in any elections ordered by the Board.

The Union's contention that striking employees retain their eligibility to vote under certain circumstances is correct. However, in view of the Board's decision, none of those circumstances exist in this case. Rather, all of the striking employees lost their status as employees when they were terminated by the Employer, and as a result of the Board's decision finding that the terminations did not violate the National Labor Relations Act.

On the other hand, the Employer argues that Section 10(g) of the Act provides that the commencement of proceedings in a United States court of appeals pursuant to a petition for enforcement or review "shall not, unless specifically ordered by the court, operate as a stay of the Board's order." It cites a number of Board cases where the Board has declined to stay its decisions on summary judgment that respondents were unlawfully refusing to bargain with unions, where prior cases involving eligibility issues of employees found to have been unlawfully discharged were before circuit courts of appeals on review. See, La Gloria Oil & Gas Co., 338 NLRB No. 122 (2003); M.J. Metal Products, 330 NLRB 502 (2000); and Midland-Ross, Inc., 243 NLRB 1165, enf'd. 653 F.2d 239 (6th Cir. 1981).

In view of the conclusion of the Board in the cases cited above, I conclude that the Board's decision in Alexandria Clinic, P.A., 339 No. 162 has determined the status of the striking employees, that the Board's conclusion is final and binding for purposes of this proceeding, and that I should not delay processing this petition because the Union has filed a request for review of the Board's decision concluding that the striking employees were lawfully terminated.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time LPNs (including RNs and medical

assistants working as LPNs) employed by the Employer at its Alexandria and Osakis, Minnesota clinic facilities; excluding other technical employees, RNs and other professional employees, chemotherapy RNs, congestive heart failure clinicians, business health coordinators, physicians, nurse practitioners, office and clerical employees, service and maintenance employees, guards and supervisors as defined in the Act, and all other employees.³

DIRECTION OF ELECTION⁴

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not

³ The Employer urges that the unit inclusions be simplified to full-time and regular part-time LPNs and medical assistants. It contends that no RNs currently work as LPNs. While I assume that the Employer's representation is true, I nevertheless order an election in a unit consistent with the unit certified in 1998.

⁴ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 28, 2003**.

been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁵

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by AFSCME COUNCIL 65, as successor to MINNESOTA LICENSED PRACTICAL NURSES ASSOCIATION.

Signed at Minneapolis, Minnesota, this 14th day of November, 2003.

Ronald M. Sharp, Regional Director
Eighteenth Region
National Labor Relations Board
Suite 790
330 South Second Avenue
Minneapolis, MN 55401

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⁵ To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221, on or before close of business **November 21, 2003**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.